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No. 03-165

IN THE

Supreme Court of the United States

GENERAL MOTORS CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR *AMICUS CURIAE* WASHINGTON LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR CERTIORARI

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INTEREST OF AMICUS CURIAE

The Washington Legal Foundation (WLF) is a public interest law and policy center based in Washington, D.C., with supporters nationwide.[1] Although WLF engages in litigation and administrative proceedings in a variety of areas, WLF devotes a substantial portion of its resources to defending free enterprise and ensuring a limited and accountable government. To that end, WLF has appeared as *amicus* in this and other courts in cases involving disputes arising from contracts with the federal government. *See, e.g., United Technologies Corp. v. Rumsfeld*, No. 03-128 (petition filed July 21, 2003).

WLF believes that this case presents an important question of fair dealing between the federal government and its contractors. If allowed to stand, the decision below will significantly alter the allocation of responsibility for pension costs associated with federal contracts, at a time when predictability in the legal principles applicable to defense and other federal contracts is especially important. WLF files this brief to assist the Court in understanding not only the substantive legal issues presented in this case, but also the broad practical implications of the decision below. WLF has no interest, financial or otherwise, in the outcome of this lawsuit.

SUMMARY OF ARGUMENT

The law of federal contracting may not be terribly glamorous, but it is vitally important for the many companies that do business with the federal government on a regular basis. In this case, the Federal Circuit erred by misconstruing one of the most important regulations governing the allocation of costs

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than *amicus* and its counsel, contributed monetarily to the preparation or submission of this brief. The parties have consented to the filing of this *amicus* brief; pursuant to Supreme Court Rule 37.3, letters evidencing this consent have been filed with the Clerk.

for the pensions of federal contractors' employees. In saddling contractors with that portion of the cost of underfunded pensions that is attributable to fixed-price contracts when a division or plant is closed, the Federal Circuit engrafted an illogical limitation on an otherwise unambiguous regulation. It dismissed the views of the promulgating and implementing agencies, once again betraying its now-familiar contempt for basic principles of agency deference. And it overstated the effect of a subsequent amendment of the relevant regulation, which merely clarified the regulation's scope.

Because the Federal Circuit has exclusive appellate jurisdiction over disputes involving federal contracts, no circuit split will ever arise over the interpretation of the underlying regulation. The Federal Circuit's erroneous interpretation, however, will allow the federal government to avoid paying more than $200 million in pension costs to petitioner in this case *alone*, and will similarly affect the allocation of pension costs in other cases governed by the regulation. In the process of misconstruing the regulation, moreover, the Federal Circuit committed fundamental errors on at least two important questions of agency deference, in conflict with decisions of this Court and other courts of appeals. In light of the great legal and practical significance of the Federal Circuit's decision, the petition for *certiorari* should be granted.

ARGUMENT

I. THE FEDERAL CIRCUIT ERRED BY HOLDING THAT THE APPLICABLE REGULATION DOES NOT REQUIRE THE ADJUSTMENT OF PENSION COSTS ATTRIBUTABLE TO FIXED-PRICE CONTRACTS WHEN A SEGMENT IS CLOSED.

A. This case involves the appropriate construction of cost accounting standards (CAS), regulations that are incorporated into federal contracts in order to ensure uniformity and consistency in the accounting principles followed by government contractors. "Proper allocation of costs by a

contractor is important because it may be necessary for the contractor to allocate costs among several government contracts or between government and non-government activities." *Eastman Kodak Co. v. Rumsfeld*, 317 F.3d 1377, 1379-80 (Fed. Cir. 2003). Among the costs that are subject to CAS are the costs of "defined benefit" pension plans: that is, pension plans whose benefits are fixed, and whose "costs" at any given time therefore will vary depending on actuarial assumptions and the performance of invested assets.

Two CAS provisions govern the allocation of costs for defined benefit pension plans. CAS 412 establishes a mechanism by which federal contractors can calculate their pension costs for a given period and allocate those costs to particular business "segments" (that is, divisions or plants) and to particular contracts. *See* 48 C.F.R. § 9904.412. CAS 413, the regulation at issue in this case, requires contractors to make annual adjustments to the pension costs of a business segment, and also provides for a final adjustment when a business segment is "closed" (say, because a division of the contractor is sold or plants shut down). *See* 48 C.F.R. § 9904.413. Because pension costs, like material and labor costs, are "part of the cost of doing business" with a federal contractor, Pet. App. 2a, the government is required to bear the cost of adjustments attributable to government contracts in the case of an underfunded plan, and is entitled to reap the benefit of such adjustments in the case of an overfunded plan. This case is governed by the original 1978 version of CAS 413, which, like the current version, states that, when a segment is closed, an adjustment should be made based on "[t]he difference between the market value of the assets and the actuarial liability for the segment." 4 C.F.R. § 413.50(c)(12) (1986).

B. In this case, the Federal Circuit held that the original 1978 version of CAS 413 allowed federal contractors to make a final adjustment *only* of those pension costs attributable to flexibly priced contracts, and not of those costs attributable to

fixed-price contracts, when a segment is closed. That decision was erroneous, and *certiorari* is therefore warranted.

1. As a preliminary matter, the Federal Circuit simply brushed aside the plain text of 1978 CAS 413.50(c)(12), which draws no distinction between fixed-price and flexibly priced contracts in requiring an adjustment to be based on "[t]he difference between the market value of the assets and the actuarial liability for the segment." 4 C.F.R. § 413.50(c)(12) (1986). Instead, the Federal Circuit engrafted a limitation on the provision by allowing final adjustments to be made only for those pension costs attributable to flexibly priced contracts — notwithstanding the undisputed fact that petitioner's contracts relating to the relevant business segment, whether fixed-price or flexibly priced, were all required to contain provisions incorporating CAS. *See* Pet. App. 6a-7a.

The Federal Circuit's construction of 1978 CAS 413.50(c)(12) is inconsistent with other CAS provisions. For example, the Cost Accounting Standards Board (CASB) expressly concluded that *equitable* adjustments could be made for costs attributable to fixed-price, as well as flexibly priced, contracts. *See* 48 C.F.R. § 52.230-2(a)(4)(i). The Board reasoned that, even as to fixed-price contracts, the government's payment price inevitably reflected the contractor's estimate of its costs, and that an equitable adjustment was therefore warranted if that estimate proved to be inaccurate. *See* Contract Coverage and Disclosure Statement, 45 Fed. Reg. 62,009, 62,010 (Sept. 18, 1980). And the Board recognized that "no commentator questioned the applicability of CAS" to fixed-price contracts more generally. *Id.* It would be simply perverse to allow *equitable* adjustments to be made with regard to both fixed-price and flexibly priced contracts when a business segment is ongoing, but not to allow *final* adjustments to be made with regard to both types of contracts when the segment is closed. The Federal Circuit's construction of 1978 CAS 413.50(c)(12) is illogical on its face,

and should be rejected.

2. The Federal Circuit also erred by refusing to accord even minimal deference to the views of the promulgating and implementing agencies that 1978 CAS 413.50(c)(12) requires adjustment for fixed-price, as well as flexibly priced, contracts.

a. The Federal Circuit first refused to defer to statements by Bernard Sacks, CASB's associate director, who was the primary drafter of 1978 CAS 413 and served as CASB's "point man" in response to compliance-related requests from contractors. *See* Pet. App. 15a. In April 1978, Mr. Sacks and Jett McCormick, CASB's legal counsel, advised the Department of Defense, in response to a question on this very issue, that the government was required to make settlements for pension costs attributable to fixed-price contracts, provided that those contracts contained provisions incorporating CAS. *See* C.A. App. 683-84. At subsequent meetings with contractors and others, Mr. Sacks emphasized the importance of requiring the government to bear only those costs attributable to contracts for *government* work, but never once suggested allocating only those costs attributable to *flexibly priced* contracts for government work. *See id.* at 685-88.

The Federal Circuit based its refusal to defer to Mr. Sacks' interpretations on three primary grounds, all of them meritless. *First*, the Federal Circuit reasoned that deference was inappropriate because the interpretations represented only the views of Mr. Sacks — whom it described as a mere "staff member" — and not those of the implementing agency at large. *See* Pet. App. 15a. A number of courts of appeals, however, have suggested that the views of lower-level agency employees are entitled to at least some degree of deference — if not the highest degree of deference required by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). *See, e.g., Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884, 894 (9th Cir. 1995) (giving full *Chevron* deference to

letter written by assistant secretary of education); *Massachusetts v. FDIC*, 102 F.3d 615, 621 (1st Cir. 1996) (giving lesser degree of deference to policy change announced by staff attorney at conference). Even if Mr. Sacks could properly be characterized as a mere "staff member," therefore, the Federal Circuit erred by failing to accord *any* deference to his views, especially in the absence of any other evidence of CASB's views on the underlying issue.

Second, and relatedly, the Federal Circuit rejected Mr. Sacks' views on the ground that they "were not published by the Board to aid the interpretation of CAS 413." Pet. App. 15a. But while this Court has recently refused to afford full *Chevron* deference to an agency interpretation of a *statute* on the ground that the interpretation is insufficiently formal, *see, e.g.*, *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000), or was not promulgated pursuant to a congressional delegation of rulemaking authority, *see, e.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001), it has never afforded anything less than full *Seminole Rock* deference to an informal agency interpretation of its own *regulations*, *see Auer v. Robbins*, 519 U.S. 452, 461-63 (1997). Indeed, in *Christensen*, this Court seemingly suggested that an agency interpretation that would not be entitled to *Chevron* deference when viewed as an interpretation of a statute could nevertheless receive full *Seminole Rock* deference when viewed in the alternative as an interpretation of a regulation. *See* 529 U.S. at 588. Even if this Court were ultimately to conclude that an informal agency interpretation of its own regulations were entitled only to a lower degree of deference, the Federal Circuit plainly erred by giving *no* deference at all to Mr. Sacks' interpretations.

Third, and perhaps most remarkably, the Federal Circuit dismissed Mr. Sacks' views on the ground that they were prepared "at least nine months after the promulgation of CAS 413." Pet. App. 16a. Even assuming the validity of that statement — putting aside the fact that Mr. Sacks' April 1978

interpretation occurred even before 1978 CAS 413 actually took effect — it is plainly not the law that an agency's interpretation of its own regulations must be contemporaneous with the issuance of those regulations in order to be entitled to deference. Indeed, in *Auer*, the agency's interpretation came only in an *amicus* brief filed at the Court's request, long after the promulgation of the relevant regulation. *See* 519 U.S. at 462. This basis for refusing to accord deference to Mr. Sacks' views, too, is therefore meritless.[2]

b. The Federal Circuit likewise erred by declining to defer to the views of the implementing agency, the Department of Defense (DOD), which has responsibility for most CAS-covered government contracts. Until 1999, DOD had generally interpreted 1978 CAS 413.50(c)(12) to require adjustment for fixed-price, as well as flexibly priced, contracts. *See, e.g.*, C.A. App. 1310, 3049-52; *Appeal of Gould, Inc.*, ASBCA No. 46,759, 97-2 B.C.A. (CCH) ¶ 29,254, 1997 WL 596820 (Sept. 19, 1997).[3] The Federal Circuit nevertheless refused to defer to DOD's views on the ground that "only the interpretation of the agency that *promulgated* the regulation matters." Pet. App. 17a (emphasis added).

The Federal Circuit's refusal to accord *any* deference to DOD's interpretations is at a minimum inconsistent with this Court's decision in *Bragdon v. Abbott*, 524 U.S. 624 (1998). There, the Court considered a situation in which "[r]esponsibility for administering [the statute] was not

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[2] The Federal Circuit also suggested that Mr. Sacks' statements were "vague," but did not elaborate on this characterization. *See* Pet. App. 15a.

[3] The Court of Federal Claims suggested that DOD had taken inconsistent positions on whether adjustment was required for fixed-price contracts. *See* Pet. App. 71a. That suggestion, however, appears to have been based on a single instance in which the Defense Logistics Agency (DLA) had taken a contrary position. *See* C.A. App. 1310. Perhaps for this reason, the Federal Circuit did not conclude that DOD had taken inconsistent positions when it refused to defer to DOD's views, but instead concluded only that DOD's views were not entitled to deference.

delegated to a single agency." *Id.* at 642. The Court did not decide whether the views of one implementing agency would be entitled to full *Chevron* deference, but instead afforded a lower level of deference to those views, and concluded that the views at issue were persuasive. *See id.* At least where, as here, the views of the implementing agency do not conflict with the views of the promulgating agency, *see, e.g., Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157-58 (1991), but instead are positively *consistent* with those views, some degree of deference is plainly appropriate. The Federal Circuit's terse refusal to defer to DOD's interpretations, like its similar refusal to defer to CASB's, was erroneous. Those interpretations belie the Federal Circuit's novel construction.[4]

c. Finally, in construing the original 1978 version of CAS 413 to require adjustment only for flexibly priced contracts, the Federal Circuit overread the 1995 amendment to that regulation. That amendment left intact the basic rule that, when a segment is closed, an adjustment should be made based on "[t]he difference between the market value of the assets and the actuarial accrued liability for the segment." 48 C.F.R. § 9904.413-50(c)(12). But the amendment stated expressly, if somewhat indirectly, that adjustments at segment closings should cover costs allocated to "*all* contracts and subcontracts * * * subject to [CAS]," whether fixed-price or flexibly priced. 48 C.F.R. § 9904.413-50(c)(12)(vi) (emphasis added).

Contrary to the Federal Circuit's conclusion, *see* Pet. App.

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[4] The Federal Circuit also noted that the original promulgating agency, the CAS Board, could not have corrected the DOD's interpretations because it "went out of existence in 1980." Pet. App. 18a. The CAS Board did temporarily go out of existence in 1980, but only because its statutory mandate had expired. CAS were administered by the Federal Acquisition Regulations (FAR) Council from 1980 until 1988, when Congress reinstituted the CAS Board. *See* 41 U.S.C. § 422. There is no evidence that the FAR Council, or the post-1988 CAS Board, disagreed with the DOD's interpretations.

20a, the 1995 amendment did not work a change in preexisting law, but merely confirmed the existing understanding that adjustments were required for fixed-price, as well as flexibly priced, contracts. Indeed, the provision setting forth the effective date of the amendment expressly notes that the amendment "clarifies, but is not intended to create, rights of the contracting parties." 48 C.F.R. § 9904.413-64(c). While the provision goes on to note that the amendment *also* "specifies techniques for determining adjustments," *id.*, that language merely reflects the fact that the amendment also established, *inter alia*, a specific formula for calculating the *amount* of a segment-closing adjustment, which had previously been left to the parties to work out between themselves. *See* 48 C.F.R. § 9904.413-50(c)(12)(vi). The 1995 amendment, like the text of the original CAS and the views of the relevant agencies, suggests that the Federal Circuit erred by limiting 1978 CAS 413.50(c)(12) to flexibly priced contracts. This Court should grant *certiorari* in order to give the regulation its proper construction.

II. THE QUESTION PRESENTED IS ONE OF EXCEPTIONAL IMPORTANCE.

If allowed to stand, the Federal Circuit's decision in this case will have nationwide effect. No split will ever arise on the appropriate construction of 1978 CAS 413.50(c)(12), because the Federal Circuit has exclusive appellate jurisdiction over all appeals in federal contract disputes. *See* 28 U.S.C. § 1295(a)(2), (a)(3); *cf.* 28 U.S.C. § 1491(a)(1) (giving Court of Federal Claims exclusive jurisdiction over federal contract disputes involving more than $10,000); 28 U.S.C. § 1346(a)(2) (giving Court of Federal Claims jurisdiction over federal contract disputes involving $10,000 or less, and giving district courts limited concurrent jurisdiction over those disputes).

For this reason, and because such cases ordinarily present issues of "importance * * * to the federal fisc," *United States v. Hill*, 506 U.S. 546, 549 (1993), this Court has frequently

granted *certiorari* to review the Federal Circuit's decisions in federal contract disputes. In fact, this Court has recently done so even where the underlying dispute was of limited broader significance. In *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604 (2000), the Court granted *certiorari* to determine whether federal contractors were entitled to receive $156 million in restitution as a result of the government's alleged breach of its obligation to allow the contractors to engage in oil exploration, arising from the enactment of a statute effectively suspending any drilling off the North Carolina coast. *See id.* at 607-14. In an 8-1 decision, the Court ultimately reversed the Federal Circuit and awarded restitution to the contractors. *See id.* at 624.

If anything, this case is a *more* compelling one for *certiorari* than *Mobil Oil*. Like *Mobil Oil*, this case involves a substantial amount of money: the adjustment being sought is worth more than $311 million plus interest, with over $200 million of that amount turning on the construction of 1978 CAS 413.50(c)(12). Unlike *Mobil Oil*, however, this case has practical implications that reach well beyond the instant parties. The construction of the regulation will affect *any* federal contractor seeking an adjustment for a segment closing occurring before the 1995 amendment (and possibly even for a segment closing occurring after 1995). *See* Pet. 21 n.10.

Finally, this case is a particularly appropriate one for *certiorari* because the Federal Circuit, in misconstruing the regulation, committed fundamental errors on at least two questions of law relating to agency deference, in conflict with decisions of this Court and other courts of appeals. Although this Court need not fully address those questions in order to reverse the Federal Circuit's decision, this case presents an ideal vehicle for their resolution should the Court choose.

If allowed to stand, the decision below will significantly alter the long-settled allocation of responsibility for the costs of the pensions of federal contractors' employees — and, in cases

such as this one, will shift that responsibility from the federal government to unwitting contractors. *Certiorari* should be granted, and the decision of the Federal Circuit reversed.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for *certiorari*.

Respectfully submitted,

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